No. 13133

In the

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

W. T. GRANT COMPANY,

Respondent.

On Petition for Enforcement of an Order of the National Labor Relations Board

RESPONDENT'S BRIEF

Eugene M. Foley,
Attorney, W. T. Grant Company.

INDEX

Cases Cited

Statute Cited

No. 13133

In the

UNITED STATES COURT OF APPEALS

for the Ninth Circuit

National Labor Relations Board,
Petitioner,

v.

W. T. Grant Company,
Respondent.

RESPONDENT'S BRIEF

The Board's Conclusions of Law

In this proceeding, relating to respondent's store in San Jose, California the Board found that respondent had violated the National Labor Relations Act as amended, holding that respondent

1. unlawfully refused to bargain with Retail Clerk's Union Local 428 A. F. L.,
2. unlawfully interrogated its employees concerning the wearing of union buttons,
3. was required to but did not consult with the union with reference either to the granting of wage increases or to the establishment of a uniform workweek for female employees (by changing the workweek of a minority from a forty hour-six day week to a forty hour-five day week) and
4. unlawfully notified its employees that it would never bargain with respect to compulsory union membership.

Summary of Argument

Respondent respectfully submits that none of the charges can be sustained; and since the total case against respondent cannot exceed the sum of its parts, the petition for enforcement of the Board's order should be denied.

After first claiming bargaining rights, the union obtained authorization cards from, at most, twenty of respondent's thirty-nine non-supervisory employees. These were presumptively valid; but respondent showed that one of the authorizations had been revoked. The Board, on the other hand, held, in effect, that the cards were conclusively valid. The respondent maintains that, in so holding, the Board committed error.

The charge that respondent questioned its employees concerning their union activities is without substance. True, Mrs. Kleidon, the assistant manager referred to union buttons as "pretty buttons" and talked "jokingly" about them but certainly this was not coercive and in any event she was not acting within the scope of her employment.

As to the establishment, during the organizational campaign, of a uniform five-day week (affecting about one-third of the female employees but without any change in the hourly work-week) and the granting of wage increases, respondent had a perfect right to make these adjustments in the normal course of business and to meet competition.

With respect to operating a union shop, respondent at no time said it would not bargain about it. It said then and it says now that it would not agree to a union shop; for it considers it un-American to attach a condition to the right to work, particularly in an instance such as this where twenty employees might require nineteen others to join a union against their will.

Argument

The Board's Brief

The Board in this case seems to be unmindful of the fact that

> "The powers conferred upon this court by the National Labor Relations Act to enforce the orders of the Board are equitable in nature and may be invoked only if the relief sought is consistent with the principles of equity" (*N. L. R. B.* v. *National Biscuit Co.,* 3rd Cir. 185 F. 2d 123, 124).

For not only are the facts colored and sometimes misstated but the union's transgressions are brushed aside. Moreover, the Board's arguments are based on false hypotheses: (a) that the union was designated as the representative of a majority of respondent's employees (b) that respondent interrogated its employees in regard to their union activities (which is fully answered in Point II herein) and otherwise tried to destroy the union's majority status (which is fully answered in Points III and IV herein) and (c) that respondent announced to its employees that it would close its store before it would "bargain" with respect to its operating a union shop.

In addition, it is said in the Board's brief that twenty-three employees received wage increases and eight were promoted, whereas the fact is, and the Board found that the promotions which were accompanied by wage increases, are included in the twenty-three wage adjustments made in February, 1950 (R. 24). And, the General Counsel's foot-note 6 on page 4 and in the foot-note on page 10 indicates that the respondent's store manager told the employees that they did not have to join the union whereas the testimony, including that to which he

points, clearly shows that the manager said "any of the girls that want to join are free to do so" (R. 141, 147).

As to the General Counsel's assertion that respondent refused to bargain with the union "after it had been designated as their bargaining agent by a majority of respondent's employees", respondent contends that there is considerable doubt as to whether the union ever represented a majority; for the only point that is certain is that, at most, it represented only eighteen of respondent's thirty-nine non-supervisory employees when, on January 5, 1950, it made its claim of majority representation. Nowhere in the Board's brief is reference made to this fact, namely that on that day, January 5, 1950, the union orally claimed bargaining rights (R. 169) and addressed to respondent a letter calling for negotiations (R. 70). Instead, the Board speaks, not as to the sending of the letter, but only of the receipt thereof by respondent at the opening of the store on January 6, 1950. The reason therefor is clear; during the day on January 6th after the receipt of the union's letter three additional employees signed union cards thus giving the union a putative majority of one on that day. But no demand to bargain was made after the unjustified demand of January 5th. Besides, no reference is made in the Board's brief of the fact that, at the very outset, the respondent's store manager told the union representative to petition the Board for an election (R. 170). The fact is that aside from one day, January 6th, 1950, the union never had a majority "signed up" because of the resignation of Marie Joldersma who signed Exhibit No. 31 and the revocation of the Guillory authorization (Exhibit No. 16). But the Board does not charge a refusal to bargain on January 6th. It is on January 25, 1950 that the offense is supposed to have been committed when respondent's attorney met with two union officials. On that day, however, aside from respondent's statement of its abhorrence of compulsory union membership and, on

the other hand, the union's statement that it would never permit respondent to operate an open shop, the meeting was confined entirely to a discussion of ways and means of proving the union's majority status, the respondent suggesting that it should be done by means of a secret election conducted by the Board and the union insisting "that we don't have an election, since it takes so much time and so much nonsensical procedure" (R. 206).*

As to the completely unjustified charge that respondent threatened to close its store rather than "bargain" with respect to compulsory union membership (answered, in part, in Point V herein) the General Counsel relies mainly on a letter sent by the writer of this brief to respondent's store manager. He says "the letter added the open threat that 'if we can't do business in San Jose on an open shop basis, we just won't do business in San Jose' ". In the first place the letter was privileged under Section 8 (c) of the Act; for it had no reference whatever to organizational activities. In this respect it may be likened to a situation where a union says "We'll get $5 an hour for salesgirls", and the employer counters that "If we can't do business there at a reasonable payroll expense we'll move our business elsewhere". Certainly, such a statement would not indicate refusal to bar-

---

* The respondent, it is claimed, delayed a determination of the issue of union representation, in that it had a fixed idea as to the appropriate unit (R. 119) and, as it informed the union on January 5, 1950, desired the issue to be resolved by an election. The union, however, delayed the filing of its petition for twenty-six days. The respondent thereafter cooperated with the Board in its procedural requirements (Exhibit 44, p. 75) and, on March 17, 1950 filed its brief on the unit question. (Receipt therefor is shown at p. 181). Like respondent, the union had until March 24, 1950 to file its brief. After receipt of respondent's brief, however, the union asked for additional time. This application was denied (Exhibit No. R. 5 on p. 182). Later, on April 4, 1950 the Board directed an election to be held within thirty days. The union then asked the Board to set the election for May 3rd (R. 110). And yet it is the respondent who is accused of causing delay!

gain about wages. In the second place it's absurd for the Board to urge that this letter should be interpreted as meaning that respondent would rather abandon its large investment in the San Jose than sit down at the bargaining table. But, the circumstances under which the letter was written militate against any finding that respondent, alone, indicated a fixed intention not to come to an agreement with the union on an issue of compulsory union membership—if the union were selected as the employees' bargaining agent: On January 25, 1950 the writer of this brief told the union officials that respondent looked with disfavor on compulsory union membership or as Mr. McLoughlin, Secretary-Treasurer of the union put it: "union security was something that the company didn't look too favorably on" (p. 32 of typewritten record). To this Mr. McLoughlin, at that meeting, said that the union would never permit the store to be operated as an open shop (R. 171, 187). In February 1950, there were rumors in the store that all employees would be required to become union members (R. 171) whereupon the store manager posted on the store's bulletin board General Counsel's Exhibit No. 56 (R. 139). Subsequently, on March 16, 1950 the union's Business Representative (R. 114) Lazarro, invaded respondent's store, turned over "curtains and things" on thirty-five or forty feet of counter space (R. 166) after "roughing up of Department 11, which is men's and boys clothes" (R. 164), visited the yard goods counter, "picking up pieces of material and stringing it out over the counter" (R. 168, 184) and then urged a customer not to buy in respondent's store (R. 184). Next, in the sequence of events was the letter under attack. Respondent contends that there was ample justification for writing it. But quite apart from this, is there any wonder that the employees thereafter abandoned this union, causing it to withdraw its petition for an election?

The General Counsel cites sixty-six cases in support of the Board's conclusions but an analysis of these cases convinces respondent that not a single one is either applicable or justifies the Board's action in this case. Neither space nor time would permit respondent's comment on all of these cases; thus the writer of this brief refers only to the three cases on which the General Counsel seems to rely most heavily, *viz.:* The cases involving *Elkland Leather Company,* 114 Fed. 2nd 221, the *Bailey Company,* 180 Fed. 2nd 278 and *Joy Silk Mills, Inc.,* 185 Fed. 2nd 732.

N. L. R. B. v. *Elkland Leather Co.,* 114 Fed. 2nd 221, referred to on page 21 of the Board's brief was decided in November 1940 several years prior to the free speech amendment, Section 8 (c) to the Act and before the acceptance of the principle that the employer could speak freely provided he made no threats or promises.

In *N. L. R. B.* v. *Bailey Co.,* 180 F. 2d 278, "during the week preceding" a Board-directed election the employer—to quote the court—"called each of its employees to its office and after impressing upon each of them its opposition to the union, proceeded to advise them of its intention to grant certain economic benefits to them * * *. The Board based its findings of an unfair labor practice upon the promises of economic benefits made by the company to the employees immediately preceding the election" (at p. 279). This case is not applicable for here no promises (or threats) were made to the employees immediately prior to the election or at any other time.

In *Joy Silk Mills, Inc.* v. *N. L. R. B.,* 185 Fed. 2nd 732, despite the fact that by September 16, 1948 a large majority (73% of the employees, according to the Court's count and 84%, according to the Board's findings: 85 N. L. R. B. at 1273) of the employees had signed authorization cards and the further fact that the employees were

on strike, the management met with the employees, discussed conditions for a return to work, negotiated with respect to and settled certain grievances and promised the employees paid vacations. Later, the employer promised to all employees a rest period and shift rotation "if the majority of the employees wanted rotation", cursed the union when an employee presented a grievance, threatened another who refused to say how he would vote, told a third that the union was run by a bunch of crooks, cautioned another not to seek votes for the union, questioned various employees concerning their views and indicated to them "that job security might be threatened and that perhaps wage rises and other benefits might not be forthcoming if the union got in". There is no such background in the instant case and thus the Joy decision is not, in the least, applicable. The Court's conclusion there, that the employer had unlawfully refused to bargain, was based on two findings, *viz.:* that the union had "a large majority" and further that the employer by coercive activities had caused the union's loss of strength.

I

The respondent was not under any duty to bargain with the union.

As to the charge that it unlawfully refused to bargain, respondent contends that it was not under any duty to bargain in advance of the employees' selection of a bargaining agent, in a secret election because (1) the union did not represent a majority of the employees when, on January 5, 1950, it demanded that respondent negotiate (further contending that the fact that the union eventually had authorization cards from twenty of respondent's thirty-nine non-supervisory employees did not render valid *ab initio* the union's spurious claim) and (2) under the facts, the issue of union representation should have been resolved by a board-conducted election.

A.

The union did not represent a majority of the non-supervisory employees when it asserted that it had the right to call for negotiations.

The union did not and does not truly represent a majority of the employees. On January 5, 1950 the union represented to the respondent, orally (R. 169) and in writing (General Counsel's Exhibit No. 36, R. 70) that it had been selected by a majority of the employees as their bargaining agent. Having no knowledge or information as to whether the union did or did not represent a majority or, indeed, any of the store people, the respondent suggested to the union's representative that a petition for a representation election be filed with the National Labor Relations Board (R. 170, 171). The union was, at first, unwilling to do so (R. 186) but later, on January 31, 1950, filed such a petition. Eventually an election was directed and, after discussions between the union and the Board's representatives "to clear our (the union's) own timing as far as the availability of our own dates were concerned" the election was set for May 3, 1950 "the agreeable day" to the union (R. 110). However, on May 2nd, the eve of the election, the union withdrew its petition and filed charges alleging, among other things, that the employer had unlawfully refused to bargain.

The Trial Examiner found that the oral and written demands to bargain, made on January 5th, 1950 were properly made since the union had "obtained authorizations from a majority of respondent's employees" (p. 37); but, the testimony adduced by the General Counsel himself showed that, on January 5, 1950, the date on which the union made its only demand for recognition, it had authorization cards from but eighteen (18) of the thirty-nine (39) non-supervisory employees (See Exhibits dated Jan-

uary 6th, 1950, to wit: Ex. 16 on p. 80, Ex. 17 on p. 81, and Ex. 18 on p. 82).*

Indeed in its decision the Board wrote:

> "The record reveals, contrary to the Trial Examiner's findings, that the union first established its majority on January 6, 1950, not January 5, 1950" (R. 23).

Upon receipt of the Board's Decision and Order upholding the Trial Examiner's findings, the respondent sent a telegram to the Board requesting a reconsideration of its decision, in the light of the decision of the United States Court of Appeals, Sixth Circuit, rendered a week earlier in *N. L. R. B.* v. *Valley Broadcasting Company* (189 Fed. 2d 582, June, 1951); and later, on June 21, 1951, served and filed a formal notice of motion for a reconsideration and expunction of that part of the Board's decision in which it was found that respondent violated section 8 (a) (5) of the Act (R. 60).

---

* Apparently, noticing the falsity of the union's representation on January 5, 1950 that it had been selected by a majority, the Trial Examiner points out, as if it had any significance, that on January 25, 1950 the union had in its possession authorization cards signed by twenty of the thirty-nine non-supervisory people then employed (R. 37). That fact—if it were a fact—would not render valid the demand made on January 5th, 1950—the only demand that was ever made. But, even so, respondent contends that in the meantime Omera Guillory had revoked her authorization and that on January 25, 1950 the union had in its possession only nineteen presumptively valid authorizations from the thirty-nine employees in the unit. Unfortunately, the Examiner cut off testimony to show that the Guillory authorization was revoked (surely no formal ceremony or special words are required to effect a revocation) but anyway, it was shown that, as a result of what Mrs. Guillory had said to another employee, the union organizer visited the former at her home (R. 163-164) asking her to reconsider or, as he put it "asking her to join the Union" (R. 130). Respondent submits that the union organizer's own language proves beyond doubt that her authorization had been revoked.

The union's attorney opposed such motion by means of a telegram to the Board worded as follows:

> "VALLEY BROADCASTING CASE NOT IN POINT BECAUSE NO REQUEST FOR BARGAINING MADE BY UNION. IN OUR CASE UNEQUIVOCAL DEMAND MADE ON JANUARY 5, 1950. SEE GENERAL COUNSEL EXHIBIT NUMBER 36. MOTION SHOULD BE DENIED FORTHWITH."

In an order dated July 11th, 1951 the Board denied the motion, "on the ground that a proper demand for bargaining was made, and therefore, the Valley Broadcasting Company decision is not applicable" (R. 61).

Unfortunately, the Board did not indicate how it determined that the demand which the Board, itself, found was made before the union obtained authorization cards from a majority of the employees was "a proper demand"; but respondent submits that the Board's characterizing such a demand as "proper" does not of course, prevent this court from deciding the question:

Does an employer's failure to accede to a union's demand to bargain, made before the union even presumptively represents a majority, constitute an unlawful refusal to bargain?

Respondent believes that the mere statement of the question furnishes its reply: A spurious demand, based on a false representation of majority status imposes on the employer no obligation to bargain or consult with the union about anything. The respondent, however, ventures further: It is submitted that, to safeguard the rights of employees to a free choice of their bargaining representative, the courts must re-examine the Board's rule that an employer's refusal to bargain with a union on demand is justified only when such refusal is motivated by a bona fide doubt that the union represents a majority.

B.

The Board should have conducted an election to determine the issue of union-representation.

It developed at the hearing of the charges against respondent, held on November 13, 1950, that, of the thirty-nine non-supervisory employees on its payroll of January 25, 1950, twenty had signed union cards (R. 37). On the basis of this finding the Trial Examiner found (R. 52) and the Board held (R. 23) that the mere possession of these cards was sufficient to make the union the lawful bargaining representative of the employees of respondent's San Jose store. In explanation it was said that

> "It is immaterial in determining the Union's majority status that some of those signing authorization cards attended no or few union meetings or otherwise indicated a lack of interest in union activities" (R. 37).

and further that

> "A Board election is only one of several ways in which the majority status of a labor organization may be determined, and where only one labor organization is claiming representative status, an employer has no absolute right to have the matter determined by an election. If the Respondent had a bona fide doubt of the Union's majority it might very properly have asked for proof of such majority, and refused proof, might properly have withheld recognition until proof, in one form or another, was furnished it. There is no evidence here that the Respondent had a bona fide doubt of the Union's majority status, and it made its position clear that it would accept no proof of such majority except through a Board election" (R. 52).

This decision is in line with an earlier Board decision (E. A. Laboratories, 80 N. L. R. B. 625) where it was said

that "Elections are held to settle questions concerning representation—to resolve real doubts, not feigned ones." But here, if it be assumed that the Guillory authorization was not revoked, that all twenty of the thirty-nine employees had signed the authorization cards, freely and without pressure from union organizers or union-minded co-employees, the union still represented only 51%: a majority of one of respondent's non-supervisory people. To contend, as the General Counsel does, that there was no doubt of the union's right to speak for a majority is tantamount to saying either that the majority was overwhelming and respondent knew it or that when, on January 5, 1950, the union made its demand for recognition it was certain that it had or would soon have authorizations from a majority and further, that there could be no expectation that a single employee of the twenty who did or would sign, might vote NO at a secret election.

The instant case is reported at 94 N. L. R. B. 145. It had recently been held in *In re F. C. Russell* (92 N. L. R. B. 206), that the questioning of an employee either "concerning the outcome of the Board election" or "as to his union views" is *per se* a violation of the Act, irrespective of the employer's motives. To this rule the Board now adds another: an employer may refuse to bargain on a union's demand only when he has a bona fide doubt as to the validity of the union's claim of majority representation. (Funk and Wagnall's Desk Standard Dictionary says a "doubt" is a "lack of certain knowledge; uncertainty; indecision;" adding that "Doubt is lack of conviction".)

Now, it should be obvious that, for an employer to know, with a reasonable degree of certainty, whether a majority has or has not freely chosen a bargaining agent, he must seek facts; and clearly he cannot do so effectively without interrogating his employees, *i. e.* committing an unfair labor practice. Since the respondent did not do this it does not seem amiss to say that the Board has found the respondent guilty of not doing what the Board forbids.

But, in no case should an employer's belief as to whether a union's organizational campaign was or was not successful be the test as to whether a union should or should not be recognized as the spokesman for his employees. If it were, it would materially weaken the guarantees of the Act; for the extent of employees' protected rights would be made to vary with the state of the employer's mind. It follows that the issue of representation should have been determined in a secret election.

Never in this writer's experience has a secret election been a futility. Consciously or not the Board in establishing the rule that an election should not be held unless there is a "real doubt" (which it has not defined) muzzled employers from presenting facts, arguments and opinions to their employees, as well as having precluded employees from making a secret choice of union or no-union.

Anyone engaged in the practice of labor law well knows, and the Board's records will convincingly show, that at a free election, it very often happens that the union receives less votes than the number of authorization cards it was able to gather in its organizational campaign. For it is common knowledge that these authorization cards are often signed under pressure of union organizers, whether they be paid organizers or union-minded co-workers, and are not infrequently signed as a result of misrepresentation. Two such instances, both involving this respondent, occurred in the experience of the writer of this brief. In one of these, involving respondent's store in Gadsden, Ala. (Case No. 10-RC-1204) the union's petition showed that thirteen of a unit of twenty employees had signed authorization cards. But only ten of the employees voted for the union, the election resulting in a tie vote. In the other, involving respondent's store at Bellaire, Ohio (Case No. 8-R-2669) the unit consisted of nineteen employees and whereas ten of these, according to the Union's petition, had signed authorization cards, only three of the nineteen voted for union representation. This was probably the result of respondent's ex-

posure of deception practiced by the union on the employees, in fraudulently exaggerating the wages and working conditions under the union's existing contracts in the community, the terms of which were actually far less liberal than the conditions which had prevailed for many years in respondent's store. Nevertheless, had the union there taken the steps that the union here has taken the Board would have directed the employer, this respondent, to bargain on the basis of the authorization cards.

Respondent's *Ybor City* case (Case No. 10-RC-838), where the union was selected by a vote of 8 to 6, might have been still another instance where the union gathered more authorization cards than votes; but by the time this election was held the board had discontinued the practice of revealing to the employer, the number of cards supporting the union's petition.

The respondent respectfully submits that the courts should bring to a halt this practice of forbidding employers from showing their people the other side of the coin and at the same time frustrating employees who might wish to express a free choice in a secret election.

II

The employees were not interfered with, restrained or coerced when Mrs. Kleidon the assistant manager passed remarks about the wearing of union buttons; nor was she acting within the scope of her employment when she made those remarks.

In considering the question whether the three employees, De Janvier, Putney and Nix were interfered with, restrained and coerced, thought should be given to the respondent's policy reiterated from time to time in announcements to employees, *viz.:* that the company recognized the right of its employees to join or refrain from joining a union (General Counsel's Exhibit No. 56,

R. 139). With this policy brought daily to the attention of the employees by means of the communication signed by the store manager and posted on the bulletin board, the respondent submits that it cannot fairly be found that Mrs. Kleidon was acting within the scope of her authority when she made comments about the wearing of union buttons.

Mrs. Kleidon was "always pleasant, good humored and talkative" (R. 150). Mrs. De Janvier testified that she talked "kiddingly" about union buttons (R. 143). Mrs. Putney said she did so "jokingly" and Miss Nix testified that she "said it in kind of a joking way" (R. 150).

These witnesses were Board witnesses and the Examiner indulged in the all too frequent practice of giving credit to that part of testimony that was favorable to the Board's charge and discrediting that part which was unfavorable, finding, as he did, that Mrs. Kleidon's remarks were made coercingly and not jokingly.

In *N. L. R. B.* v. *Reynolds,* 162 F. 2d (7th Cir.), 680, Fleishhaker, the General Manager (like Mrs. Kleidon, the Assistant Manager of this thirty-nine-employee store) "appears to have been in a talkative mood and on quite friendly terms with Fisher, Bullard and Lingle". In a conversation with these three employees he stated "I have lived under Hitlerism and I have lived under Americanism and I have been under laborism" and "you know out of the three isms, the only one that is any good is Americanism. I am telling you, this unionism has to stop, I would never get mixed up in any labor movement". This statement, the Court said, "was clearly an expression of his own opinion and there is not the slightest reason to think that it was for the purpose of or that it had any coercive or restraining effect upon the employees to whom it was made".

It is to be noted that Mrs. Kleidon did not presume to suggest, for example, that the store manager or the company does not want employees to wear union buttons (R. 151). Nor is there even a suggestion in the record that Mrs. Kleidon or anyone else in respondent's supervisory organization was hostile toward unionization. The background so frequently relied on to characterize the practice complained of is completely lacking in this case.

It is suggested that the Board's stigmatizing the respondent for Mrs. Kleidon's remarks borders on the absurd; for, among other things, the notice on the bulletin board (General Counsel's Exhibit No. 56) was a continuous disavowal of her comments. Besides, her remarks constituted no threat or intimidation, or promise of favor or benefit and thus, as stated in *N. L. R. B.* v. *Montgomery Ward and Company Incorporated,* 2 Cir., Oct. 1951, —— Fed. 2d —— they

> "were not unlawful, particularly after the 1947 amendment of the Act found in § 8 (c), 29 U. S. C. A. § 158 (c) N. L. R. B. v. Sandy Hill Iron & Brass Works, 2 Cir., 165 F. (2d) 660, 662; Sax v. N. L. R. B., 7 Cir., 171 F. (2d) 769."

It follows that Mrs. Kleidon's remarks did not constitute a violation of Section 8 (a) (1) of the Act.

III

Nor was the granting of wage increases a violation of Section 8 (a) (1) of the Act.

During the week ending February 23, 1950 "twenty-three (employees) received merit (and promotional) increases" (R. 39). Although the General Counsel and the union had the burden of proof neither attempted to show that these increases brought the wages above the going

rate. Respondent thereupon sought, through James P. McLoughlin, the Secretary-Treasurer of the union (R. 69), to prove the negative, *viz.:* that the increases in wages that were given during the week of February 23, 1950 did not bring the wages of any respondent's employees above the going rate (R. 111). The union's counsel objected to this, arguing (at the foot of p. 111) that "the cross examination with reference to wages, Kress' or anywhere else, has nothing to do with that; secondly, wage scales in other stores have, as I can see, no connection at all with the unilateral granting of a wage increase by this employer" (p. 112, first line). His objection was sustained. Later, however, the General Counsel sought to show (R. 188) that the respondent's counsel knew the rates prevailing in the S. H. Kress store and that the increases given by the respondent matched them but, unfortunately, respondent's counsel had no personal knowledge on the matter.

Respondent had a right to grant these increases. "The Act does not preclude an employer from introducing benefits during an organizational period" (*Joy Silk Mills* v. *N. L. R. B.,* 185 F. 2d 732, 739).

In the Matter of Bergmann's, Inc., 71 N. L. R. B. 1020, the Board held that an employer has "a perfect right", during a union's organizational campaign, to grant wage increases, holiday and vacation privileges, if they are granted "in the normal course of its business, or to meet the competition of other employers in the same area" (p. 1031). In that case, the union's organizational campaign came to the attention of respondent's president in the latter part of July or the first part of August 1945. He thereupon called upon his attorney for advice. The attorney asked Mr. Bergmann about the wages he was paying and then advised him that if he was not then paying a "going wage" * * * "to at least pay what the" other laundries in the area were paying. Bergmann did noth-

ing about this advice on or about December 12, 1945 (p. 1020). On that day, (p. 1031):

> "the respondent posted its notice that the number of holidays granted to the employees was to be tripled, and a vacation policy, hitherto non-existent was to be instituted. That notice also referred to wage increases which would be forthcoming, *if the OPA were to grant the respondent permission to raise its prices.* Nevertheless, on March 7, 1946, the day before the scheduled election, respondent notified its employees in a letter 'that it would grant these increases regardless of the OPA's decision on the pending application to increase prices'. The respondent contends that it promised wage increases and granted holiday and vacations with pay to its employees because other laundries in the area had done so. The record presents insufficient facts to indicate that other laundries did raise their wages or grant vacations and holidays on or about December 12, 1945 or March 7, 1946. The undersigned therefore makes no finding with respect to any increases in pay, or vacations or holidays granted by other laundries in the area to their employees at those times. In any event, the undersigned does not consider this contention to have merit since it is clear that the respondent promised a raise in wages to its employees on March 7, 1946, the day before the election, for another reason which had little or nothing to do with what the respondent's competitors were doing with respect to vacations, holidays or wages.
>
> "The distribution of this letter on the eve of the election was, in effect, an adroitly timed maneuver intended by the respondent to persuade its employees to repudiate the Union. The respondent knew, between February 1 and 13, 1946, that it had the right to raise wages without consulting OPA, and according to the respondent understood that it was

required to do so since it had already 'promised' to do so in its notice posted on December 12, 1945. But it did not make the announcement of its intentions to its employees until the evening of March 7, 1946. Respondent's choice of this opportune moment for notifying its employees was not a coincidence, but a studied move to lead the employees to cast their votes against the Union. By its well-timed announcement of this economic concession as well as by other means, the respondent sought to show the employees that they could rely exclusively upon it for economic advantages and minimized the need for a collective bargaining agent. The effects of such an object lesson in the futility of self-organization upon the free exercise by the employees of their right to choose a bargaining representative needs little elaboration."

In the Matter of Continental Oil Company, 58 N. L. R. B. 169 the Board said at 172:

"It is virtually impossible to ascertain the full effects upon the employees' free exercise of the right to select a collective bargaining representative of the W. L. B.'s announcement just prior to the run-off election that it had approved the wage increase * * *.

"We shall, therefore, sustain the C. I. O.'s objection as to the premature release and posting of the W. L. B. ruling approving the wage increase, and we shall set aside the run-off election held on May 9 and 10, 1944."

In the Matter of La Salle Steel Company, 72 N. L. R. B. 411, the Board said at page 414:

"We agree with the Trial Examiner that the respondent, by announcing, on the very day of the election that the National War Labor Board, herein called

> the W. L. B., had approved wage increases for the employees, interfered with its employees' freedom of choice in the election of April 20, 1945, in violation of Section 8 (1) of the Act. * * * Moreover, quite apart from the respondent's motive, we are convinced and find that the timing of the announcement prevented a free choice by the employees in the election. We, accordingly, sustain the Union's objection to the election based on the respondent's publication of the action taken by the W. L. B. and we shall therefore set aside the election held on April 20, 1945''.

In the Matter of Goodall Company, 68 N. L. R. B. 252, it was said at page 265:

> ''Although the Regional War Labor Board notified the respondent by letter, dated April 28, 1944, that it had approved the vacation plan with certain modifications, the employees were not informed of this until May 30, the day before the election, when President Ward announced it in his speech to the assembled employees. * * *
>
> ''In agreement with the Trial Examiner, we find that the timing of Ward's announcement of the vacation plan on the day before the election was calculated to influence the employees to reject the Union in the election and that the respondent thereby interfered with the right of its employees to self-organization, in violation of Section 8 (1) of the Act.''

In the *Bergmann* case, the Board said that the employer had a right to grant wage increases between February 1 and 13, 1946, *i. e.,* anytime between the fifth and third week before the election but it was wrongful to grant them on a March 7th, 1946 ''the day before the election''. In the *Goodall* case it was indicated that the employer had the right to announce the vacation plan a

month before the date set for the election. In the instant case, the wage increases were granted *ten* weeks before the date of the scheduled election not "just prior to" as in the *Continental Oil Co.* case or "the very day of the election" as in the *La Salle Steel Company* case. Respondent, therefore, urges that it had "a perfect right" to grant the increases and was under no obligation to consult with the union for three reasons:

(1) the union's claim of majority representation was false when made;

(2) the increases were granted "in the normal course of business" and

(3) the increases were granted "to meet competition".

It follows that the granting of the wage increases was not a violation of the Act.

IV

The Board's counsel conceded that "a great many people" and "a majority" of the employees in the unit were working on a 40 hour five day week before the union came on the scene. It was error to hold that respondent had no right, ten weeks prior to the scheduled election to make its work-week uniform by changing thirteen employees from a 40 hour six-day week to a 40 hour five-day week.

On February 23rd, 1950 the work-week of thirteen of the thirty-seven female employees (R. 41) was changed from a forty hour, six day work week to a forty hour, five day work week. The Examiner found that the respondent made this change in the work week thinking that there would then be "less incentive for them (the employees) to work and vote for the union" (R. 42).

In the first place, the record is barren of even a suggestion that the change was considered desirable by any but one of the female employees involved (R. 41).

In the second place there is not a scintilla of evidence that the attainment of a five day week was in the mind of a single employee who signed an authorization card (R. 129).

Furthermore, the General Counsel conceded (R. 158) that before there was any talk of unionization "a great many people" (R. 157) and "a majority" (R. 158) of the employees had had a work week of five days, forty hours, and respondents submits that the testimony shows that any employee could have had a five-day week for the mere asking (R. 161, 167). Respondent respectfully contends that this change was too remote to influence the election, had one been held; and in any event, it had a right to make this change in the normal course of its business and to meet competition (R. 144).

V

In notifying its employees that it would not agree to make union membership a condition of employment the respondent did not violate the Act.

On January 25, 1950 respondent's representative informed the Secretary-Treasurer of the union that it did not look with favor on compulsory union membership (R. 186) whereupon the union's representative countered with "We'll never go for that" (R. 187) or "We just can't go for that" (R. 171). Did this indicate a fixed intention on the union's part to refuse to bargain on the union shop if it were selected by a majority of respondent's employees as their bargaining agent? Neither the Board nor the Examiner answered this question (41st and 42nd Exceptions, R. 21).

Early in February, 1950 there were rumors (R. 171) "to the effect that if the store was organized it would

definitely be a union shop and at that time, or a little while later I (the store manager) did post a notice'' (General Counsel's Exhibit No. 56).

Was it illegal for the employer to speak about the prospect of compulsory union membership in terms as strong as the union used on January 25, 1950? Both the Examiner and the Board (with one member dissenting) answered this question in the affirmative.

In *American National Insurance Co.* v. *N. L. R. B.,* 187 F. 2d. 307 (5th Cir.), the Trial Examiner wrote:

> ''3. * * * True, the Act recognizes (Section 1) that inequality of bargaining power existing between unorganized employees and organized employees burdens commerce but in ameliorating this condition the Act protects employees in their right to self-organization only. Economic strength is still the underlying touchstone of success at the bargaining table.''

The Board, however, overruling its Examiner, found the employer guilty of refusing to bargain with the union by, in effect, insisting on a clause embodying the functions and prerogatives of management. The Court on the other hand held, that the employer's insistence on the inclusion of the prerogative clause was not any less in good faith than the union's was in resisting its inclusion. It said (at p. 310)

> ''It was not, therefore, as the Board finds, the steadfastness of the employer alone, in insisting on its point. It was the steadfastness of the employer and the union, the one in proposing, the other in opposing, a clause of this kind, which the employer felt it ought and the union felt it ought not to have * * *.
>
> ''Before the enactment of the National Labor Relations Act, as amended, there was despite the decisions of the courts to the contrary, some understandable confusion as to what 'collective bargaining' required of

employees. This was due to the persistence of the board in asserting and pressing its view that the use in the National Labor Relations Act of the words 'collective bargaining' meant that the employer had to agree to terms proposed by the union, if in the opinion of the board these terms were reasonable, and that a failure to agree to such terms was a basis for a finding that the employer was not bargaining in good faith. Since, however, that term has been defined in the National Labor Relations Act as amended, 29 U. S. C. A., sec. 158 (d), there is no longer any basis for differences of opinion as to what it means or for board orders in effect requiring the employer to contract in a certain way."

"* * * in the quotation from the examiner's report, set out in note 3 above, the law is correctly stated".

In the *Matter of La Salle Steel Company,* 72 N. L. R. B. 411, the Board said at page 413:

"The Trial Examiner found that the respondent's letter of April 19, 1945 was violative of the Act. He rejected the respondent's defense of free speech on the ground that the letter was an integral part of the respondent's campaign against the Union, and on the further ground that the respondent unlawfully distributed the letter to its employees by attaching copies thereof to the employees' time cards. We do not share all his views. * * * Nor do we agree with our dissenting colleague that the statements contained in the letter that employees would be protected in their right to work 'irrespective of membership or non-membership in any labor organization' and that the respondent would not be 'a party to any agreement' whereby employees would be 'compelled to pay for the right to continue to work for this company' did violence to the employees' rights. These statements did not establish such a fixed determination by the respondent not to bargain later concerning union security as can reasonably be regarded

as constituting interference with the rights of employees within the meaning of Section 8 (1) of the Act. * * *"

In *Matter of Tygard Sportswear Company and ano.,* 77 N. L. R. B. 613, it was found (p. 624), that

"Both Lerner (Vice-President: p. 622) and Garvey (Plant Manager) stated frankly that the plant would remain an open shop in the event the employees voted for the union."

The Board said (p. 614):

"We do not, however, adopt the Trial Examiner's conclusions concerning the speeches made by S. R. Lerner and James D. Garvey on June 13 and 14, 1946. The Trial Examiner found that these speeches were violative of Section 8 (1) of the Act, because they were part of a coercive course of conduct, and because they contained certain statements concerning the respondent's 'open shop' policy which the Trial Examiner interpreted as an anticipatory refusal to bargain concerning the union security issue. We disagree with this interpretation and find that the statements in question did not evince a fixed determination not to bargain on the subject of union security. We also disagree with the Trial Examiner's theory that the speeches, which otherwise consisted only of argument and opinion, acquired a coercive character because the respondents had on other occasions by their actions and statements violated section 8(1) and (3) of the Act."

In *N. L. R. B.* v. *Union Pacific Stages,* 9th Cir. 99 Fed. 2d 153, the Court held similarly, saying at page 163:

"The evidence shows that the Company was conducting its business on the open shop basis; in doing so the respondent was within its legal rights. If the talk of

> Walsh its president, amounted to no more than a declaration of that policy it did not violate the Act."

Respondent was not under any duty to stand mute on its policy regarding compulsory union membership. Nor can it be fairly held that a statement of an unwillingness to agree is tantamount to an unwillingness to bargain.* For the Board itself has held in the *Matter of Stevens,* 68 N. L. R. B. 229.

> "A policy, however strongly held may, and often does yield at the bargaining table."

The respondent, however, does not pretend that there was any prospect of its yielding at the bargaining table. Its contention here is that it did not at any time indicate that it would not bargain on any subject if the union were selected as the employees' bargaining agent.

CONCLUSION

It is respectfully submitted that the Board's findings are not supported by substantial evidence on the record considered as a whole, that its conclusions are contrary to law, that its order is unreasonable and that its petition should be dismissed.

EUGENE M. FOLEY,
Attorney, W. T. Grant Company.

February, 1952.

---

* The Board, in effect, holds that respondent's views regarding compulsory union membership demonstrated that it would not approach the bargaining table with an open mind—that its conduct was not that of one seeking agreement. One might ask: does the Board require unions to hold no fixed views with regard to the union shop? In any case, an open mind "need not mean a mind without conviction nor need it mean a mind easily swayed by argument" (*American National Ins. Co.,* v. *N. L. R. B.,* 187 F. 2d 307, footnote at p. 309).

Appendix.

The Relevant Statute

"Who May File Petitions—Elections by Secret Ballot"
Section 9 (c) (1)

as it is written	as the Board construes it
"Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—	Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—
(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9 (a), * * *	(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9 (a), * * *
the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the	the Board may investigate such petition and may provide for an appropriate hearing on due notice. The Board may also direct an election by secret ballot; but if the petition be supported by authorization cards signed by more than 50% of the employees in an appropriate unit . such authorization cards shall be deemed conclusive evidence

Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof. * * *

(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board."

of representation and no election need be held. The Board in such case may direct the employer to bargain with the representative named in such cards notwithstanding any direction of election that might have theretofore been made by the Board.

(4) It shall be the employer's burden to determine, without interrogating his employees, or otherwise violating this Act, whether more than 50% of his employees have freely chosen the representative designated in authorization cards and in the absence of a showing by the employer that such designations were procured through coercive methods or misrepresentation, nothing in this section shall be construed as relieving him from the obligation of bargaining on demand with such representative.